

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

with affidavits

77-2093

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To be argued by
CARL T. SOLBERG

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-2093

LYMAN T. SHEPARD,
Petitioner-Appellant,
—against—

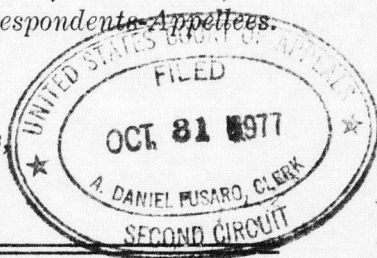
LARRY TAYLOR, Warden, Metropolitan Correctional
Center, and MAURICE SIGLER, Chairman, United
States Parole Commission,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENTS-APPELLEES

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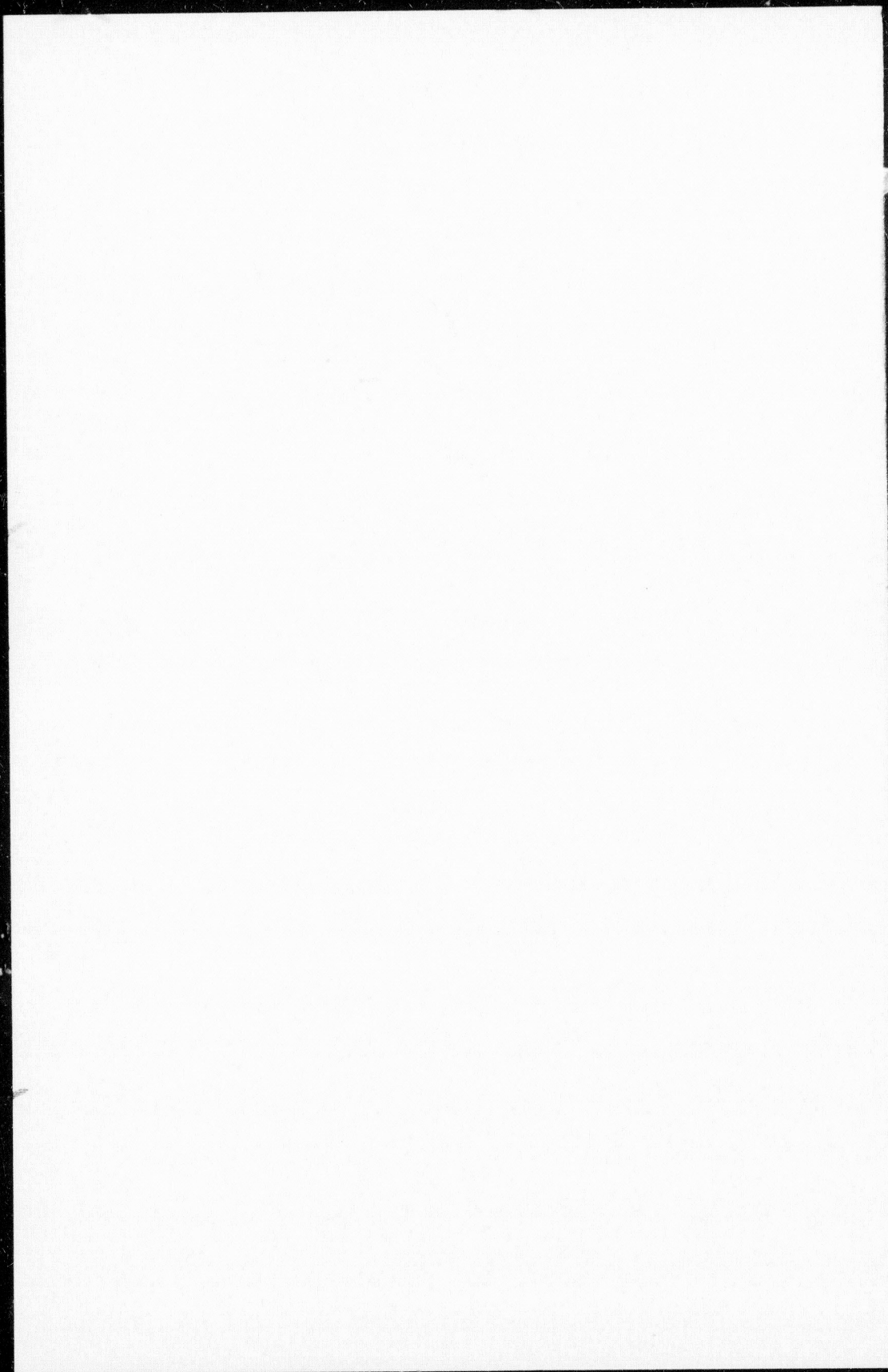


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Docket No. 77-2093

LYMAN T. SHEPARD,
Petitioner-Appellant,
—against—

LARRY TAYLOR, Warden, Metropolitan Correctional Center,
and MAURICE SIGLER, Chairman, United States Parole Commission,
Respondents-Appellees.

BRIEF FOR RESPONDENTS-APPELLEES

Issue Presented

Did the District Court err in vacating as moot its earlier order granting a writ of habeas corpus on the ground that the Parole Commission had released petitioner on parole?

Statement of the Case

This is the third substantive appeal presented to this Court concerning Mr. Shepard's parole status. *Shepard v. United States Board of Parole*, 541 F.2d 322 (2d Cir. 1976), *vacated and remanded*, 45 U.S.L.W. 3488, 97 S.Ct. 779 (1977), *remanded for dismissal as moot*, Dkt. No. 76-2021 (2d Cir., May 4, 1977) (*per curiam*) (*Shepard I*); *Shepard v. Taylor*, 556 F.2d 648 (2d Cir. 1977)

(*Shepard II*). The background of Mr. Shepard's experience with the criminal justice system is fully chronicled in Chief Judge Kaufman's opinion in *Shepard II* and will not be fully repeated here.

In brief, Mr. Shepard was convicted of a felony in the Western District of Texas in 1972. Due to his youth and what Chief Judge Kaufman described as "the so-called 'rehabilitative ideal' . . . a relic of an earlier, more optimistic era," *Shepard II, supra*, 556 F.2d at 650, Mr. Shepard was sentenced as a youthful offender pursuant to the provisions of the Youth Corrections Act, 18 U.S.C. §§ 5010(b) and 5017(c). The sentencing District Judge necessarily determined that Mr. Shepard would benefit from the "treatment" accorded to youthful offenders. The terms of the sentence are statutorily defined as release conditionally, on parole, on or before 4 years from the date of conviction, and unconditionally on or before 6 years from conviction. 18 U.S.C. § 5010(b).

Mr. Shepard was incarcerated as a youthful offender for two years and was paroled on April 18, 1974 in Florida. Subsequently, his parole was violated in two respects: he left the Middle District of Florida, a violation, travelled to New York City, and unfortunately was involved in the attempted armed robbery of a fast-food restaurant on October 18, 1974. Mr. Shepard was convicted for this latter offense and served two years in a New York State penal institution before being released on state parole on December 15, 1976.

During Mr. Shepard's state incarceration, the Parole Commission lodged a detainer against him, which detainer formed the genesis for *Shepard I*.

In *Shepard I*, Mr. Shepard successfully contended that he was entitled to a prompt review of the detainer by the Commission during his state incarceration. This Court

agreed, but noted a split in the Circuits, 541 F.2d at 324. The Government petitioned for a writ of certiorari. The Supreme Court vacated this Court's judgment and remanded the case to this Court for reconsideration in light of *Moody v. Daggett*, 429 U.S. 78 (1976). On remand, this Court noted that Mr. Shepard had been given his parole revocation hearing and stated: "His federal parole was revoked and his prison sentence extended to at least November, 1977." This Court held that any prejudice attributable to a delay in the hearing "appears to us too remote and speculative to support further injunctive relief." *Shepard I*, Dkt. No. 76-2021 (2d Cir., May 4, 1977). Consequently, the case was dismissed as moot.

We believe it fair to state that no one contends that Mr. Shepard's parole should not have been revoked. The central issue, then, was whether he would benefit from further institutional confinement.

This issue was presented in *Shepard II*. The Commission determined the issue of further confinement in light of its reparole guidelines, 28 C.F.R. § 2.21, 41 Fed. Reg. 37324-25 (Sept. 3, 1976), recently promulgated pursuant to 18 U.S.C. § 4203(a)(1). Mr. Shepard contended that this increased his punishment and that the procedure used was violative of the *ex post facto* provision of the Constitution. The issue was one of first impression. Chief Judge Kaufman, writing for the Court in *Shepard II*, held that this contention was correct.

The constitutional violation we find in the instant case results from the application to a person—who would be under state supervision for two years while he attends college with a guarantee of housing and gainful employment—of new and onerous considerations that were forbidden when he was originally sentenced in 1972.

The illegality we have delineated in the Commission's emphasis on factors of general deterrence and retribution in revoking Shepard's parole requires an immediate new hearing. The Commission should determine whether, to use the words of the statute, Shepard "will [benefit from] further treatment in an institution or other facility." 18 U.S.C. § 5020. The standards for release will be those in existence prior to the 1976 amendment of 18 U.S.C. § 5017.

Ancillary to this central holding, the Court also considered Mr. Shepard's claim that he should be allowed, through the Commission, to subpoena his state institutional records and the personal appearance of his state counsellor. The Court directed the Commission to "reconsider its decision not to permit Shepard" these subpoenas. The Court noted that "in this unusual case any detailed evidence of institutional progress that will aid at the rehearing to predict Shepard's ability to readjust to society is relevant—indeed crucial." *Shepard II*, *supra*, 556 F.2d at 655.

The Commission scheduled a new hearing, and petitioner's counsel renewed the earlier requests for subpoenas for Mr. Shepard's New York State institutional records and for the presence of his state caseworker (who had declined to appear voluntarily at petitioner's January hearing, but instead supplied a written opinion with respect to petitioner's fine record while in state confinement). The Commission reconsidered, and again declined to issue the subpoenas, on the grounds that it already had sufficient documentation of petitioner's state incarceration, and additionally had taken extensive testimony from petitioner and his sister regarding his state experiences at the January hearing. Finally, the Commission noted that a more recent report of petitioner's institutional adjustment in Federal custody was being

prepared and would be considered at the new hearing; since petitioner had been in Federal custody for several months at this point, this new report would naturally provide more up-to-date information than petitioner's state records.*

The new parole revocation hearing directed to the issue of the length of confinement was held on June 10, 1977, within the time framework directed by this Court. At the close of the hearing, the two examiners notified petitioner and his counsel of their recommendations, which they then passed on to the Regional Commissioner for a decision.**

Petitioner has not claimed that the hearing was held in an untimely fashion. Immediately following the hearing,

* Petitioner now claims that this new report "could not have been considered by the Regional Commissioner in making the decision on the subpoenas because neither of the reports was in the possession of the Commission until June 9; indeed, one was not written until June 9, whereas the subpoena requests were denied on June 8, 1977. (Citations omitted)." Appellant's Brief at 9. This claim is belied by the text of the Commission's June 8 letter to counsel, attached as Appendix D to Appellant's Brief, which specifically states the Commission's *expectation* that the MCC report would be prepared, disclosed and considered by the examiners—which it was. Nor can petitioner claim that the telephoned denial of the subpoenas to his counsel on June 8 omitted this factor, because "[t]he letter recites the same reasons as those given over the telephone." Appellant's Brief at 6 fn.

** Petitioner's characterization of this process—"the examiners were unable to reach a single decision on disposition, leaving the decision for the regional office." (Appellant's Brief at 8)—is based on a misapprehension of Commission procedure. Hearing examiners do not make final decisions, only tentative ones; the final decision based on a parole revocation hearing is generally made by the Regional Commissioner, after a review of the recommendations. 28 C.F.R. §§ 2.13, 2.23. In this case, the decision on Mr. Shepard's June 10 hearing was issued by the Regional Commissioner on June 17: Mr. Shepard was to be released on parole effective immediately.

before the Commission could issue its decision, petitioner obtained an order directing respondents to show cause on June 13 why a writ of habeas corpus should not issue, based on errors he perceived in the June 10 hearing. Petitioner charged error in (1) the Commission's decision not to grant the requested subpoenas, (2) the examiners' decision to allow petitioner one but not two attorneys in the hearing room, and (3) the fact that one of the two examiners had signed the Commission's parole revocation warrant issued against petitioner some two years previously. These alleged errors, petitioner charged, departed from the mandate of this Court's May 27 decision.

Judge Tenney ordered issuance of the writ, in an opinion dated June 14, on the grounds that the June 10 hearing had been constitutionally infirm due to the subpoena decision and the examiner's prior involvement in the case.* The Court stayed its decision, however, until June 21, to permit a possible appeal. *Shepard v. Taylor*, 433 F. Supp. 984, 987 (S.D.N.Y. 1977). Pending further developments, the District Court also freed petitioner on his own recognizance.

On June 17, the Regional Commissioner issued the Commission's decision, releasing petitioner on parole effec-

* The examiner, Mr. William Tenney, was employed by the Commission as a Post-Release Analyst in 1974. His name was thus routinely signed to all such warrant applications, and related correspondence, sometimes—as on the warrant application here—by someone else in his absence (his signature on the application is followed by someone else's initials in parentheses). This fact was brought to the attention of petitioner's counsel at the time of the June 10 hearing, but faced with the fact that a replacement hearing could not be immediately scheduled, petitioner understandably chose to proceed. In any event, the Commission contends that the signatures were purely ministerial, and hardly demonstrate prejudice on the part of Mr. Tenney or the Commission, as proven by the result of the hearing. No evidence of prejudice was ever taken.

tive immediately. Counsel for the Government notified the Court of this development. Pursuant to directions from the District Court, both sides submitted proposed orders on June 23. Petitioner proposed his release "from all custody and control of the United States. . . ." The Commission proposed an order dismissing the petition as moot.

Petitioner opposed vacatur of the June 14 order, on the grounds that his release from custody should have included release from supervision of parole. To quote petitioner's position in the District Court, "[f]or the entire length of his possible federal parole term, Mr. Shepard will be haunted by [the examiners' summary of the June 10 hearing]." Affidavit of Gordon J. Johnson, dated June 23, 1977.*

On June 24, Judge Tenney issued an order vacating his June 14 order and dismissing the petition as moot.

Thus, it appears to the Court that the petitioner has now received the result which he originally desired from the Parole Commission and that the essence of the mandate of the court of appeals has been fulfilled.

Petitioner brought on a motion for reargument, by order to show cause, which was denied on July 7, 1977. This appeal ensued.

* Mr. Shepard's parole term will expire at the end of his sentence on April 9, 1978.

ARGUMENT

The District Court's Decision Granting The Writ Was Properly Vacated As Moot.

This case is moot because the Commission granted Mr. Shepard all the relief he asked for, all the relief it could grant, all the relief he would have gotten if he had initially prevailed on the two petitions for writs of habeas corpus in the District Court: release on parole.

Central to an understanding of the issue presented by this case is the form and substance of Mr. Shepard's writs which were before this Court as part of the record on appeal in *Shepard II*.

In his first petition for a writ of habeas corpus, Mr. Shepard sought his release on parole. *Shepard v. Taylor*, 77 Civ. 83. Petitioner explained the relief sought from the District Court as follows: "Since the hearing granted to Mr. Shepard was constitutionally defective resulting in his prejudice, the parole detainee and warrant should be dismissed, the order revoking parole declared void, and Mr. Shepard released on parole." Memorandum of Law for Petitioner, dated January 14, 1977, at 9. Petitioner's brief to this Court in *Shepard II* explained that this petition "sought dismissal of the warrant and his return to parole status." Appellant's Brief at 11.

While Mr. Shepard's second petition for a writ of habeas corpus stated only that it sought his "release from custody, on the ground that he is being detained in violation of the Youth Corrections Act . . .", *Shepard v. Taylor*, 77 Civ. 387, he initiated the action by an order directing respondents to show cause why he should not be "released from custody to complete his term of parole. . . ." Order dated January 27, 1977, /s/ Lawrence W. Pierce, United States District Judge, *Shepard v. Taylor*, 77 Civ. 387.

Moreover, relief from detention in violation of the Youth Corrections Act, which directed that sentenced youth offenders be released on parole not later than four years from the date of conviction, 18 U.S.C. § 5010(b), logically could only mean release on parole.

This Court's decision of May 27 instructed the Commission to hold a new parole revocation hearing in accordance with the opinion within 14 days, failing such a hearing, the writ was to issue. *Shepard v. Taylor, supra*, 556 F.2d at 655. The thrust of the opinion was that the January hearing had been defective because the Commission, in reaching a disposition, had applied the wrong standards. This Court did *not* hold (1) that the hearing was defective because the Commission erred in refusing to issue the requested subpoenas, or (2) that the Commission's decision to revoke Mr. Shepard's parole was error. On the contrary, *revocation* of Mr. Shepard's parole was not challenged—only the procedure followed by the Commission in reaching a custodial disposition *after* revocation of parole. Mr. Shepard, in facing the Commission at the time of his parole revocation hearing, was actually *on federal parole*; he had been released by the New York State authorities, and he had reverted to his pre-state incarceration status, which was federal parole (stemming from his 1972 6-year sentence by the United States District Court for the Western District of Texas). Thus at the January parole revocation hearing, the Commission had two alternatives for disposition: release Mr. Shepard on parole as before, or incarcerate him on the ground that he would benefit from further institutional treatment.

That hearing was held defective, and the Commission was ordered to hold a rehearing, employing the standards in effect at the time of Mr. Shepard's 1972 sentence—standards to be used in determining whether to release Mr. Shepard on parole or incarcerate him further. To enforce its direction to the Commission, this Court or-

dered that if the Commission failed to hold a hearing employing the 1972 standards within 14 days, the writ would issue. It did not specify the terms of the writ's issuance. Petitioner assumes that any issuance of a writ means absolute freedom. On the contrary, an issuance of the writ based on a failure by the Commission to hold a proper hearing would have to place petitioner in the position he occupied last January when he first confronted the Commission on his parole revocation hearing: on parole.

The construction of this Court's decision suggested by petitioner—that a defective hearing compels his total release from physical and parole custody—would lead to a result that could not have been contemplated by this Court. Release of Mr. Shepard without further parole restrictions would amount to vacatur of his 1972 sentence, which specified a six-year term of custody and supervision. 18 U.S.C. § 5010(b). The decision as to when he would be released from such custody and supervision was left, by law, to the Commission, and it should be kept in mind that the standard for that decision, not the decision itself, brought about this litigation.

Petitioner's view of the consequences of this Court's decision is based wholly on an irrelevant citation of *Billiteri v. United States Board of Parole*, 541 F.2d 938 (2d Cir. 1976). (Appellant's Brief at 12). No other authority is cited. The Commission agrees that *Billiteri* stands for the proposition that a federal court has no power to conduct its own parole revocation hearing and order a person released on parole. However, Judge Tenny did no such thing; he simply vacated his earlier order, thus letting stand the Commission's decision releasing Mr. Shepard on parole. The result urged by petitioner—his total release—would rather violate *Billiteri*, in the sense that a court ordering such release would be usurping the Commission's role by making a decision entrusted by statute to the Commission.

In the District Court, petitioner relied on *United States ex rel. Schuster v. Vincent*, 524 F.2d 153 (2d Cir. 1975), as authority for his position that the Commission's alleged misconduct warranted his release from parole supervision. Affidavit of Gordon J. Johnson, dated June 30, 1977, at 3. In that case, this Court held that the state's unconstitutional incarceration of a prisoner in a mental institution for 27 years, together with flagrant violations of the Court's earlier mandate, warranted discharge of the prisoner from all custody.

The Commission's actions in this case cannot be compared to the facts in *Schuster*. The Commission contends that it committed no error in connection with the June 10 hearing. Even assuming *arguendo* that it did commit error, it has hardly demonstrated a pattern of bad faith in dealing with Mr. Shepard sufficient to involve *Schuster*. *Shepard I* involved a point of law on which there was a split among the Circuits; *Shepard II* turned on a point of first impression. With respect to the June 10 hearing, this Court ordered the Commission only to "reconsider" its subpoena decision; the Commission did reconsider, and decided not to issue the subpoenas because its file would shortly contain more up-to-date and valuable information than the subpoenas could possibly elicit. With respect to the hearing examiner, the mere assertion that Mr. Tenney, in a different job capacity, had signed a warrant and correspondence regarding petitioner some two years previously hardly amounts to a demonstration of prejudice sufficient to render the hearing reversible error. See *King v. Warden, United States Penitentiary*, 551 F.2d 996, 1001 (5th Cir. 1977). Most significantly, petitioner has not been prejudiced. He is free on parole as a result of the June 10 hearing—the very result he sought, the most he could have hoped for. He could not have done better if he had prevailed on his petitions in the District Court. This case is therefore moot, and vacatur of the June 14 judgment (which had been stayed and thus never

took effect) was the proper result. *See United States v. Munsingwear*, 340 U.S. 36 (1950).

CONCLUSION

For the foregoing reasons, the District Court's decision vacating its June 14 judgment as moot should be affirmed.

Dated: New York, New York
October 31, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn,
deposes and says that s he is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
31st day of October 19 77 she served ^{two copies} ~~the~~ of the
within Brief for Respondents-Appellees

by placing the same in a properly postpaid franked envelope
addressed:

Phylis Bamberger, Esq.
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Federal Defender Services Unit
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New York, New York 10007

And deponent further
says s he sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse Annex,
One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Marian J. Bryant

31st day of October, 19 77

Pauline P. Toner
PAULINE P. TONER
Notary Public, State of New York
No. 31-4692361
Qualified in New York County
Commission Expires March 30, 1978

